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SUPREME COURT OF THE UNITED STATES

.....Term, 1942

No.....

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and
Appellants below,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and
Appellee below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and Brief in Support Thereof.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners respectfully show:

I.
SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a suit in equity, brought in the Circuit Court of Dade County, Florida in August 1939 by Samuel J. Barco, as insured, against The Penn Mutual Life Insurance Company of Philadelphia, as insurer, to reinstate a life policy, surrendered by him, as its terms allowed, because of his inability to pay a premium supposed due on July 25, 1938. The suit was removed to the United States District Court for the Southern District of Florida, Miami Division (Supp. T. 13). On October 10, 1939 Mr. Barco died, and his widow, as his executrix, and his two children, as beneficiaries of the policy's death benefit, amended the complaint so as to seek recovery not only of the monthly disability benefits for which Mr. Barco had sued, but also of the death benefit (T. 2-6 and 28-31). The essential allegation for the policy's reinstatement was that its surrender was caused by a mutual mistake of the existing fact that insured had been totally disabled for three months prior to July 25, 1938.

Other facts alleged were (a) that by reason of his Christian Science faith, and his practitioner's service, Barco did not believe his disability total or permanent until July, 1939, when (on August 2, 1939) he wrote the insurer offering to furnish proof of it, and (b) that the policy was issued in April 1925 for $100,000, reduced to $50,000 in January 1937, that the premiums paid for the

thirteen years were about $39,000, and by the policy's terms if Mr. Barco had given notice of his disability on July 25, 1938, he would not have had to pay any premium then or thereafter, would have gotten a disability benefit of $250.00 per month until his death, and his children the death benefit less a loan note of $10,473.76.

The defendant moved to dismiss said amended complaint. The District Judge denied that motion. At the final hearing all of said alleged facts were proved or conceded by insurer's answer, and the District Judge so held (Findings of Fact 234-6), but stated that his view of the law had changed (Discussion 239) so he then found for defendant. An appeal was taken to the United States Circuit Court of Appeals for the Fifth Circuit. On that appeal the issues presented were (a) that the District Judge had erred in failing to follow the law in the case of **Minnesota Mutual Life Ins. Co. v. Marshall** (8 Cir.), 29 F. (2d) 977, approved by this court in the case of **Bergholm v. Peoria Life Ins. Co.**, 284 U.S. 489, and (b) that the District Judge had erred in failing to follow Florida law as shown in three Florida cases (named in annexed brief) which hold that notice of disability is excused if the giving of it is "unreasonable". That court affirmed the decree of the district court. A petition for rehearing was filed and denied.

II.
REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals for the Fifth Circuit has in this case rendered a decision in conflict with the decision on a similar matter of the Circuit Court of Appeals for the Eighth Circuit in the case of **Minnesota Mutual Life Ins. Co. v. Marshall**, 29 F. (2d) 977, which case waives proof of existing disability if it exists before default in a premium payment.

2. The Circuit Court of Appeals for the Fifth Circuit has in this case decided an important question of local (Florida) law in a way probably in conflict with the applicable local (Florida) decisions in the Tharpe, Hallowes and Lynch cases (cited in paragraph II(4)) of the annexed brief, holding that the furnishing of proof of disability is waived if its furnishing is unreasonable.

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals for the Fifth Circuit had in the case numbered and entitled on its docket, No. 9990, Blanche W. Barco, as Executrix of the Estate of Samuel J. Barco, deceased, et al., Appellants, v. The Penn Mutual Life Insurance Company of Philadelphia, Appellee, to the end that this cause may be reviewed and determined

by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals for the Fifth Circuit be reversed by the court, and for such further relief as to this court may seem proper.

Dated May 19, 1942.

BATCHELOR & DYER
DAVID W. DYER
HENRY K. GIBSON
of Counsel

O. D. BATCHELOR,
Counsel for Petitioners

SUPREME COURT OF THE UNITED STATES

.....Term, 1942.

No.....

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and
Appellants below,

vs.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and
Appellee below.

Brief in Support of Petition for Writ of Certiorari.

I.
Opinion of Court Below.

The opinion in the Circuit Court of Appeals for the Fifth Circuit (T. .....) is reported in 126 F. (2d) 56.

II.
Jurisdiction

1. The date of the decree to be reviewed is February 26, 1942. A petition for rehearing was denied on March 23, 1942.

2. The statutory provision which is believed to sustain the jurisdiction of this court is its Rule 38, Section 2.

3. The facts which show that the nature of this case and of the rulings below are such as to bring the case within the jurisdictional provision relied on are:

(a) That the decision of the Circuit Court of Appeals for the Eighth Circuit in the Marshall case, supra, excusing the insured's failure to furnish proof of his disability, even though the terms of the policy, if followed literally, would have required such proof, was ignored by the Circuit Court of Appeals for the Fifth Circuit in this case, though submitted by us as controlling because the language of the Barco policy is no more mandatory for the furnishing of such proof than is the language of the Marshall policy.

(b) That the dicision of the Circuit Court of Appeals for the Fifth Circuit in this case, while it concedes that the three Florida cases cited by it are controlling and waive the furnishing of proof of disability if such furn-

ishing is impossible or unreasonable, the court erred in not making proper application of those decisions to the undisputed facts in this case.

4. The cases believed to sustain said jurisdiction are as follows:

Minnesota Mutual Life Ins. Co. v. Marshall, 29 F. (2d) 977;

Bergholm v. Peoria Life Ins. Co., 284 U.S. 489;

Franklin Life Ins. Co. v. Tharpe, 178 So. 300, 130 Fla. 546 (Jan. 7, 1938);

Hallowes v. N. Y. Life Ins. Co., 184 So. 7, 133 Fla. 872 (July 14, 1938);

Reliance Life Ins. Co. v. Lynch, 197 So. 723, 144 Fla. 50 (May 28, 1940).

III.
Statement of the Case.

This has already been stated in the preceding petition's Summary Statement of the Matter Involved, which is hereby adopted and made a part of this brief.

IV.
Specification of Errors.

(A) The Circuit Court of Appeals for the Fifth Circuit erred in failing to interpret the Barco policy as the

policy in the Marshall case, supra, was interpreted by the Circuit Court of Appeals for the Eighth Circuit, and by this court approved in the Bergholm case, supra.

(B) The Circuit Court of Appeals for the Fifth Circuit erred in holding that the Florida law would not reinstate the Barco policy, although that law held that furnishing notice of disability would be waived if existing circumstances made its furnishing unreasonable; the court's opinion being that Mr. Barco's religious belief that his disability was not total and permanent did not make it unreasonable for him to furnish notice of it.

V.
Argument.

Point A.

The error specified in IV(A) supra:

In support of our view that the decision of the Circuit Court of Appeals for the Fifth Circuit in this case is at variance with the decision of the Circuit Court of Appeals for the Eighth Circuit in the Marshall case, supra, and with the decision of this court in the Bergholm case, supra:

The Marshall policy provides:

"If the insured shall become totally and permanently disabled as hereinafter provided and shall

> furnish satisfactory proof thereof the company will waive the payment of premiums thereafter becoming due * * *."

The Circuit Court of Appeals for the Eighth Circuit, construing this language, held that the existence of the disability **before the premium became in arrears** was enough to create the waiver of the furnishing of proof of it; and this court in the Bergholm case held:

> "We do not need to controvert this construction of the words quoted, or question the soundness of the view of the court that the existence of the disability before the premium became in arrears, standing alone, was enough to create the waiver. In that view, the obligation to furnish proof was no part of the condition precedent to the waiver; but such proof might be furnished within a reasonable time thereafter."

That Barco offered such proof in a reasonable time—upon giving up his law office in July 1939—is not denied, and the language in the Barco policy is similar to that in the Marshall policy quoted above, reading:

> "Disability Benefits shall become effective as of the date of commencement of total and permanent disability of the insured, as herein defined, if due proof of such disability is received by the Company at its Home Office within six months from said date of commencement * * *."

This language in the Barco policy is no more specific that proof must be furnished as a condition precedent than is the language above quoted from the Marshall policy, and since in the Marshall case only one year's premium had been paid, whereas in the Barco case thirteen years' had been, it is more equitable that the relief sought in the Barco case be granted.

In the **Florida Tharpe** case, supra, which approves the Marshall case, the language of the policy requiring proof of disability was more mandatory than that in either the Marshall or the Barco policy, it being:

> "If the insured after the issuance of the policy shall become totally and permanently disabled by bodily injury or disease * * * and shall furnish proof satisfactory to the Company of such disability, the Company agrees to waive further payment of premiums under said policy, such agreement to become operative only after endorsement of the same has been made on said policy by the Company."

The provisions in the Bergholm policy are, of course, much more mandatory than those in the Marshall, Tharpe and Barco policies.

To quote the last sentence of the Circuit Court of Appeals' decision in the Barco case:

> "His religion did not interfere with his duty to give notice of his disability to the insurer, which

was a condition precedent to the recovery of disability benefits."

This statement that Barco's giving of notice was a condition precedent is a definite repudiation of the Marshall case.

We submit, therefore, that a writ of certiorari should be issued by reason of the Fifth Circuit Court of Appeals' failure to follow the Marshall case.

Point B.

The error specified in IV(B) supra:

In support of our contention that the decision of th Circuit Court of Appeals for the Fifth Circuit is at vari ance with Florida law, as shown by the Tharpe, Hallowe and Lynch cases, supra, holding that if the furnishin of proof of disability is unreasonable it will be excuse how can it be held that it would not have been "unreaso able" for Mr. Barco to have furnished in July 1938 proo of his total and permanent disability as of April 25, 193 when his conscientious belief then was that such tot and permanent disability did not exist? That belief w established by his Christian Science practitioner as h testimony shows (T. 82)—a disease of cancer of the thro (as diagnosed by a medical doctor) having been by h healed in 1937, and though she continued to treat hi until July 1939, it was not known that his then existi disease was tuberculosis until several months after t

surrender of his policy. He continued to go to his law office for a year after July, 1938, and the Circuit Court of Appeals in its opinion held that this fact showed it was not "impossible" for Barco to furnish proof of his disability. We concede that statement to be correct, for we are not relying on the view that it was "impossible" for Mr. Barco to furnish notice of his disability. That it was "unreasonable" is our view, and we quote from the language of the **Florida Lynch** case, the last decided of the three Florida cases, supra:

> "It seems to be settled law in Florida that a default in serving notice of proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or **unreasonable.** * * *" (Emphasis ours)

The Florida Supreme Court then held that the Lynch case was ruled by the Tharpe and Hallowes cases, supra.

While the Circuit Court of Appeals for the Fifth Circuit stated this to be Florida law, it did not, in our view, make proper application of it to the facts in the Barco case. To consider these facts in comparison with those in the three Florida cases, supra: (1) In Tharpe's case he was treated for tuberculosis in hospitals for two years prior to his death and did no work; (2) in Hallowes' case his total and permanent disability began four and a half months prior to his death, and he made two trips to Philadelphia for medical treatment, abandoning his

law practice, and (3) in Lynch's case he had six months of total and permanent disability prior to his death but was in a hospital for half the time. There is no evidence in either of these three cases showing any lack of knowledge or belief of total and permanent disability, or showing any hope of recovery. It would not, therefore, have been as "unreasonable" for them to have furnished proof of total and permanent disability as for Mr. Barco to have done so in July 1938, when he surrendered his policy. If an insured lacks knowledge of his total and permanent disability because of his sincere belief that it does not exist, on what theory can it be held that it would not be unreasonable for him to furnish proof of such disability? How can it be held that Mr. Barco knew he had been totally and permanently disabled for three months prior to his surrender of his policy in July 1938, when the fact is that if he had so known he could have avoided paying all premiums, have received $250.00 per month beginning April 25, 1938 until his death, and the net death benefit of about $40,000 then left to his children? In lieu of all those benefits, he got, for his surrender of the policy, $1,74.

The insurer in its answer denied its knowledge of the disability and charged Mr. Barco with negligence in failing to furnish proof of it. The insurer furnished no proof of such negligence, but we must concede the existence of it if the court holds that Barco's Christian Science faith gave him no legal excuse for failing to furnish proof of his disability; but since such negligence was not culpable it will not prevent the policy's reinstatement. To quote from **Pomeroy's Equity Jurisprudence, Third Edition (Vol. 2, Sec. 856):**

> "Even a clearly established negligence may not of itself be a sufficient ground for refusing relief if it appears that the other party has not been prejudiced thereby."

Surely the insurer was not prejudiced by Mr. Barco's failure to furnish proof, and that this principle applies to equitable reinstatement of life policies see 29 Am. Jur., Sec. 311, page 285. This is cited with approval in the Illinois case of **Boyd v. Aetna Life Ins. Co.**, 35 N.E. (2d) 99, decided in July 1941, in which a policy was cancelled for $4.19 by the wife of the insured as its sole beneficiary because of her inability to pay premiums. The husband was then separated from her, and without her knowledge or that of the company was then totally and permanently disabled. Upon proof of these facts the court reinstated the policy. The facts in the Barco case are in complete accord, and that his failure to furnish proof of disability was excused by the three Florida cases, supra, is beyond question. We respectfully request, therefore, that a writ of certiorari be granted.

Point C.

Answers to statements in the opinion of the Circuit Court of Appeals for the Fifth Circuit:

(a) "It is affirmatively alleged and proved that Barco acknowledged himself to be so disabled."

The time of Barco's acknowledgment of such disability is not therein stated. If it refers to July 1939, as shown by his letter of August 2, 1939 (Supp. T. 15), it is true;

but if it refers to July 1938, when he surrendered the policy—as it likely does since elsewhere in its opinion it stated that Barco "recognized his total disability at all times after April 15, 1938"—we respectfully deny that his knowledge of such disability was either "alleged" or proved."

The Allegations:

In the original complaint it is alleged by Barco:

> "Plaintiff did not at said time" (the time of surrender) "know the cause of his disability nor that it was total and permanent within the meaning of said policy."

In the amended complaint filed by his executrix and children it is alleged:

> "Plaintiffs aver that said policy was thus cancelled by reason of a mutual mistake between decedent and defendant, due to a lack of knowledge and belief of a then existing fact, namely, that decedent was then totally and permanently disabled, and had been for more than three months, which fact, if known, would have prevented the said cancellation of said policy. * * *
>
> "That at the time of said cancellation, decedent knew he was so disabled as to be incapacitated for his work as a lawyer, but did not then know such disability was permanent and by reason of his Christian Science faith he expected to be re-

stored to good health and hence did not ask the defendant to relieve him of the obligation to pay the premium then apparently due on said policy."

It is, therefore, **not alleged**, as claimed by the Circuit Court of Appeals, that Mr. Barco "acknowledged himself to be so disabled" as of April 25, 1938.

The Proof:

No evidence whatever is cited by the court in support of the statement above quoted and none could be, for there is none. As already shown by the testimony of his Christian Science practitioner and the District Judge's Findings of Fact, hereinabove mentioned, Mr. Barco did not acknowledge himself to be so disabled until July 1939.

(b) "It is not necessary here to determine the effect of such a sincere religious conviction upon one's contractual obligations under the law of Florida."

This finding is at variance with both the Marshall and the three Florida cases, supra, for neither of those four cases compels strict compliance with "contractual obligations" if the insured, in failing to comply with a life policy's terms, has a reasonable excuse and the insurer is not injured thereby. That Barco had a reasonable excuse for his failure to furnish proof of his disability is established by his sincere religious conviction that his dsability was not total and permanent as the policy provided, and that the insurer was not injured by Barco's failure to furnish such proof is beyond question, since the insurer will not have to pay more money on the policy's

reinstatement than it would have had to pay if the policy had not been surrendered and the notice of his disability had been furnished.

(c) "His religion did not interfere with his duty to give notice of his disability to the insurer, which was a condition precedent to the recovery of disability benefits."

On what theory is that opinion? Barco's letter of August 2, 1939, to the insurer, and the testimony of his Christian Science practitioner, (T.82) show beyond doubt that his religion did so interfere. If not, what did prevent his giving such notice? The giving of it would have given him $250.00 per month with no further premium payments, and the death benefit to his children. His failure to give it gave him $1.74.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

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Counsel for Petitioners.

BATCHELOR & DYER
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 98

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and Appellants below,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and Appellee below.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941
No. 1257

BLANCHE W. BARCO, as Executrix of the Estate of SAMUEL J. BARCO, Deceased; WALTER L. HARRIS, as Trustee of said Estate; BETTY BARCO and JACK BARCO, a Minor, by BLANCHE W. BARCO, His Mother and Next Friend,

Petitioners and
Appellants below,

v.

THE PENN MUTUAL LIFE INSURANCE COMPANY OF PHILADELPHIA, a Corporation,

Respondent and
Appellee below

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.
COMMENTS ON PETITIONERS' SPECIFICATION OF ERRORS

(A) It was not necessary for the Circuit Court of Appeals in the instant case to interpret the Barco policy on the point of when the time of waiver for the payment of premiums began. That was not the question before the court. The question decided by the court is succinctly expressed by it on page 57 of its opinion, (126 Fed. (2d) p. 56), as follows:

> "The gist of the claim for reinstatement, therefore, is that the policy was thus cancelled by reason of a mutual mistake between Barco and the insurer, due to a lack of knowledge and belief of the then existing fact that Barco was totally and permanently disabled, which fact, if known, would have prevented the cancellation of the policy. Whether these conditions created a mutual mistake of fact legally operative to vitiate the cancellation is the sole question for our decision."

The Circuit Court of Appeals in its opinion did not repudiate the doctrine in the Marshall case as to when the period of waiver for payment of premiums began to run. On the contrary the court so far as was necessary inclined toward the Marshall opinion on that point. The court's decision was not based upon an interpretation of the policy on the point in question but on a state of facts

which make an interpretation unnecessary. The court said, at page 57:

> "Barco thus knew, at the time he defaulted in the payment of the premium and prior to the surrender of the policy for cancellation, that he then was, and for more than three months had been, totally disabled. He also then knew, or was charged with knowledge, that such total disability for a period in excess of three months was considered total and permanent disability under the terms of his policy. His misconception as to the permanency of his disability had no effect whatever upon his contractual rights under the policy. His was a mistake of judgment, not of fact, and it bore no relation to his religious beliefs."

So, regardless of whether the Circuit Court of Appeals did or did not adopt the rule in question, announced in the Marshall case, becomes immaterial by reason of the fact that Barco's rights to disability benefits ripened upon the continuance of his recognized disability for a period of three months. With knowledge of these facts, and after the expiration of the three months, to-wit: on July 27, 1938, Barco surrendered his policy for cancellation and was paid its cash value.

(B) In this specification, the petitioners urge that the court erred in holding that the Florida law would not reinstate the Barco policy.

The Florida rule contended for is the one holding that furnishing notice of disability will be waived if existing circumstances make its furnishing impossible or unreasonable. The court in its opinion recognized the Florida law to be as stated by the petitioners, and said, at page 57:

> "But this principle gives no refuge to these appellants for several reasons. The communication of notice was not at all impossible. The record shows that Barco, for a period of at least a year subsequent to the incurrence of his disability, was able to discharge some business. He negotiated the transaction involving the surrender of his policy and the acceptance of its cash value, and, a full year later, was able to file suit to compel the reinstatement of his policy after his negotiations to procure that result without litigation had failed."

We do not know that we can add anything to what the court has said on this point, but it may be helpful if we should set forth the facts under which the Florida Supreme Court has held that furnishing of notice of disability would be waived. The three cases on which petitioners rely are:

> **Franklin Life Ins. Co. v. Tharpe,** 178 So. 300, 130 Fla. 546 (Jan. 7, 1938);
>
> **Hallowes v. N. Y. Life Ins. Co.,** 184 So. 7, 133 Fla. 872 (July 14, 1938);

Reliance Life Ins. Co. v. Lynch, 197 So. 723, 144 Fla. 50 (May 28, 1940).

In the case of the **Franklin Life Ins. Co. v. Tharpe,** supra, it was contended that the insured did not pay a premium when due, or furnish proof of his disability within the period fixed by the policy. Justice Brown, in a concurring opinion, said, on page 308:

> "Now as to the insured himself, the question, which it seems to me is the main question of fact in the case, was whether the evidence showed that the mental and physical condition of the insured was such as would excuse performance by him with regard to furnishing to the company proof of his total disability. This question was determined by the court below in favor of the plaintiff, appellee here, and under our well-established rule this determination should not be set aside on appeal unless it was clearly erroneous. We can not say that this conclusion of the chancellor from the evidence was clearly erroneous."

In the case of **Hallowes v. New York Life Ins. Co.** (Fla.) 184 So. 7, the court said on p. 11:

> "Undoubtedly, the terms of the contract contemplated that such 'due proof' should be furnished by the insured to the company during his lifetime.
>
> The real question upon which this case turns is

whether Mr. Hallowes, the insured, was legally excusable for not furnishing these 'due proofs' of permanent disability before his death. They were furnished by his executors with reasonable promptness after his death. These provisions of the policies with refernce to the furnishing of proofs of permanent disability were undoubtedly intended to prevent the company from being imposed upon. But in this case the evidence overwhelmingly shows that Mr. Hallowes was desperately ill from April 5, 1933, until his death on August 21st following. He was not physically or mentally in any condition to make these proofs. Nor was it shown that his wife (who was a beneficiary as to the life insurance only) knew anything about these policies or their provisions with refernce to the furnishing of proofs, and his son acted promptly as soon as he became convinced, a week before the end came, that his father's disability was presumably permanent. But before Mr. Bacon could secure the affidavits of the physicians, and furnish the 'due proofs' to the Company, Mr. Hallowes died. The law does not require the impossible, and in this case it indubitably appears that the furnishing of these proofs of disability to the Company or its officers was not possible until after Mr. Hallowes' death. The evidence shows that his family did not entirely give up hope of his recovery until, a few days before his death, they took him to Philadelphia for the last time. Under such circumstances the failure to furnish due proofs of

such disability to the Company's home office during the life time of the insured was practically impossible, and, as we see it, legally excusable; and the failure to do so should not therefore, relieve the Company of liability for the disability payments to which Mr. Hallowes was entitled under the terms of the policies."

In the case of the **Reliance Life Ins. Co. v. Lynch,** (Fla.) 197 So. 723, the court said, at p. 724:

"It appears to us that the real question presented for a decision is whether or not the insured was legally excusable for failure to furnish proof satisfactory to the company while the policy was in force that he had become totally and permanently disabled for life by bodily injury or disease and thereby effected a waiver of premium payments. The policy provides that due proof of such disability must be submitted during the life time of the insured and prior to or within three months after default in any premium payment. * * * *

"It seems to be settled law in Florida that a default in serving notice or proof of loss as required by a policy may be excused where the circumstances are such as to render strict compliance with the requirements impossible or unreasonable and the insured has not failed to use due diligence. Thus a default may be excused by

the physical or mental incapacity of the insured or the claimant under the policy. It seems that the excuse offered for default in submitting proof of total and permanent disability under the terms of the policy was the physical condition of the insured as he was taken sick in July, 1931, immediately went to his bed, and was subsequently moved to a hospital, where he died. The record shows that the insured was unable to attend to his business and was delirious much of the time and was physically unable to advise the insurance company of his total and permanent disability from the time of his seizure with the illness until his death due to the ravages of the disease upon his body and mind. The beneficiary of the policy was ignorant of the terms of the policy and due dates of the premiums, and after the death of her husband so notified the insurance company."

(C) Under this subdivision, the petitioners find fault with the court's statement:

> "It is affirmatively alleged and proved that Barco acknowledged himself to be so disabled."

The court here was speaking of a total disability.

While this objection is an immaterial one, we make the following observations: In the bill of complaint, filed by Mr. Barco on August 24, 1939, in paragraph III, (Tr. p. 252), it is alleged:

> "That at the time of said concellation, and for some time prior thereto, and ever since, plaintiff was and has been totally and permanently disabled within the meaning of said policy, Plaintiff's Exhibit "A". That although plaintiff attempted to continue to maintain his law office, he was, by reason of said disability, prevented from substantially performing every part thereof. Plaintiff did not at said time know the cause of his disability, nor that it was total and permanent within the meaning of said policy."

In the supplemental bill of complaint filed by the Executrix of Mr. Barco, in paragraph (c), (Tr. p. 4), it is alleged:

> "That at the time of said cancellation of said policy, and continuously for more than three months prior thereto, and continuously thereafter until the date of decedent's death on October 10, 1939, decedent was totally and permanently disabled within the meaning of said policy, Plaintiffs' Exhibit "B"."

Thus it is conceded that at the time of the cancellation of the policy on July 27, 1938, Barco was totally and permanently disabled. Whether Barco had actual knowledge of his total and permanent disability in April, 1938, is altogether immaterial for the reason expressed by the court on page 57 of its opinion:

> "Barco thus knew, at the time he defaulted in

> the payment of the premium and prior to the surrender of the policy for cancellation, that he then was, and for more than three months had been, totally disabled. He also then knew, or was charged with knowledge, that such total disability for a period in excess of three months was considered total and permanent disability under the terms of his policy." (126 Fed. (2d) 56, 57.).

Mr. Barco did not need to know at the time he surrendered his policy for cancellation that he had been totally and permanently disabled for a period of three months. The policy created this presumption for him. He was charged with knowledge of the provisions of his policy. So, the objection that is made under this heading, that Barco did not acknowledge in April, 1938, that he was then totally disabled, has no force in view of the provisions of the policy.

Respectfully submitted,

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